

**Notice of Allowability**

Application No.

10/628,383

Examiner

N. Bhat

Applicant(s)

SOLORIO ET AL.

Art Unit

1764

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--**

All claims being allowable, PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application. If not included herewith (or previously mailed), a Notice of Allowance (PTOL-85) or other appropriate communication will be mailed in due course. **THIS NOTICE OF ALLOWABILITY IS NOT A GRANT OF PATENT RIGHTS.** This application is subject to withdrawal from issue at the initiative of the Office or upon petition by the applicant. See 37 CFR 1.313 and MPEP 1308.

1. ☒ This communication is responsive to Notice of Withdrawl from Issue of 10/27, 2005 and Restriction/Election of 11-29-2005.
2. ☒ The allowed claim(s) is/are 1-24 and 26-32 re-numbered as claims 1-31 respectively.
3. ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some\* c) ☐ None of the:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\* Certified copies not received: \_\_\_\_\_.

Applicant has THREE MONTHS FROM THE "MAILING DATE" of this communication to file a reply complying with the requirements noted below. Failure to timely comply will result in ABANDONMENT of this application.  
**THIS THREE-MONTH PERIOD IS NOT EXTENDABLE.**

4. ☐ A SUBSTITUTE OATH OR DECLARATION must be submitted. Note the attached EXAMINER'S AMENDMENT or NOTICE OF INFORMAL PATENT APPLICATION (PTO-152) which gives reason(s) why the oath or declaration is deficient.
5. ☐ CORRECTED DRAWINGS (as "replacement sheets") must be submitted.
- (a) ☐ including changes required by the Notice of Draftsperson's Patent Drawing Review (PTO-948) attached
- 1) ☐ hereto or 2) ☐ to Paper No./Mail Date \_\_\_\_\_.
- (b) ☐ including changes required by the attached Examiner's Amendment / Comment or in the Office action of Paper No./Mail Date \_\_\_\_\_.
- Identifying indicia such as the application number (see 37 CFR 1.84(c)) should be written on the drawings in the front (not the back) of each sheet. Replacement sheet(s) should be labeled as such in the header according to 37 CFR 1.121(d).
6. ☐ DEPOSIT OF and/or INFORMATION about the deposit of BIOLOGICAL MATERIAL must be submitted. Note the attached Examiner's comment regarding REQUIREMENT FOR THE DEPOSIT OF BIOLOGICAL MATERIAL.

**Attachment(s)**

- |   |   |
|---|---|
| 1. <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 5. <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)                       |
| 2. <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                | 6. <input checked="" type="checkbox"/> Interview Summary (PTO-413),<br>Paper No./Mail Date _____. |
| 3. <input type="checkbox"/> Information Disclosure Statements (PTO-1449 or PTO/SB/08),<br>Paper No./Mail Date _____ | 7. <input checked="" type="checkbox"/> Examiner's Amendment/Comment                               |
| 4. <input type="checkbox"/> Examiner's Comment Regarding Requirement for Deposit<br>of Biological Material          | 8. <input checked="" type="checkbox"/> Examiner's Statement of Reasons for Allowance              |
|   | 9. <input type="checkbox"/> Other _____.  |

### DETAILED ACTION

1. On October 27, 2005, applicant was informed that this application withdrawn from issue. The reason for the withdrawal was to have the examiner reconsider the art of Viallagran et al. USP 6,180,159 as being obvious over claim 25. All other claims were deemed free of the prior art. Because the issue fee has already been paid, the examiner and applicant's representative discussed advancing prosecution by restricting claim 25 from the other claims. Applicant's representative agreed to elect with traverse to prosecute the group drawn to the 3X concentrate and frozen beverage. Because these claims have been deemed to be allowable, claim 25 would be cancelled and remaining claims would be allowed.

2. Action on the merits of claims 1-32 follows:

3. Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-24 and 27-32, drawn to a concentrate, frozen beverage and method of preparing a frozen beverage, classified in class 426, subclass 565.
- II. Claim 25, drawn to a creamer, classified in class 426, subclass 586.

The inventions are distinct, each from the other because of the following reasons:

4. Inventions I and II are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects (MPEP § 806.04, MPEP § 808.01). In the instant case the different inventions in the instant case, the creamer can be used alone and need not be added to the concentrate or frozen beverage as claimed.

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5. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.

6. Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II, restriction for examination purposes as indicated is proper.

7. During a telephone conversation with Mr. Wallace on November 29, 2005 a provisional election was made with traverse to prosecute the invention of Group I, claims 1-24 and 26-32. Affirmation of this election must be made by applicant in replying to this Office action. Claim 25 has been withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

8. During a telephone conversation with Mr. Wallace on November 29, 2005, the examiner informed applicant's representative that claims 1-24 and 26-32 were free of the art and the examiner requested cancellation of claim 25 with traverse by examiner's amendment. Applicant's representative authorized cancellation of claim 25 reserving the right to file for a Divisional application.

9. An examiner's amendment to the record appears below. Should the changes and/or additions be unacceptable to applicant, an amendment may be filed as provided by 37 CFR 1.312. To ensure consideration of such an amendment, it MUST be submitted no later than the payment of the issue fee.

Authorization for this examiner's amendment was given in a telephone interview with Mr. David Wallace on December 1, 2005.

The application has been amended as follows:

In the Specification:

Page 1, paragraph [001], line 2 after "60/399,437" insert --filed 7-31-2002--.

In the Claims:

Cancel claim 25 in its entirety. Applicant reserves the right to file for a divisional application.

10. The following is an examiner's statement of reasons for allowance:

The invention relates to a reduced calorie 3X concentrate comprising about 0.01 to about 0.4% by weight high potency sweetener; about 1 to about 30% by weight flavoring; about 1 to about 32% by weight sugar substituted; about 0.3 to about 12% by weight ethanol, wherein the concentrate has less than about 32° Brix. Also claimed is a water based creamer which includes a creamer which includes about 0.1 to about 10% emulsifier; about 0.001 to about 2% stabilizer; about 1 to about 15% sweetener and about 0.01 to about 12% fat. The prior art fails to teach a concentrate, which includes ethanol, and further when the concentrate is diluted for the preparation of a freezable beverage, the beverage has a Brix value of less than 11° and an ethanol content of about 0.1 to about 4%, which is not taught or suggested by the prior art.


Any comments considered necessary by applicant must be submitted no later than the payment of the issue fee and, to avoid processing delays, should preferably accompany the issue fee. Such submissions should be clearly labeled "Comments on Statement of Reasons for Allowance."

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11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 571-272-1397. The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Glenn Caldarola can be reached on 571-272-1444. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
N. Bhat  
Primary Examiner  
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